No. 15146.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON BEHALF OF

APPELLANT LOUIS GLENN BALLARD

THOMAS WHELAN
413 Orpheum Theatre Bldg.
San Diego 1, California

Attorney for Appellant
Louis Glenn Ballard

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INTRODUCTION

This is the opening brief on behalf of Appellant Louis Glenn Ballard. In this brief in the interest of brevity Appellant Louis Glenn Ballard will be referred to as "Ballard." Whenever appellants Clifford L. Duke, Jr. and Vic Buono are referred to they will be referred to as "Duke" and "Buono".

JURISDICTIONAL STATEMENT

The criminal prosecution in this case was instituted by an indictment containing ten counts. In Count IV the appellants Ballard, Duke and Buono and alleged unindicted co-conspirators were charged with a conspiracy in violation of U. S. C., Title 18,

Section 371. In Counts V and VI of the indictment appellant Ballard is charged in the Southern District of California with a violation of U. S. C., Title 18, Section 545. The District Court, therefore, had original jurisidiction under the provisions of United States Code, Title 18, Section 3231.

Following motions made by appellant for dismissal of the indictment, for a severance and separate trial, and a motion for bill of particulars, which motions appear in the clerk's transcript, all of which motions were denied, the appellant was tried with his co-defendants Duke and Buono - the trial commencing on August 3, 1955 and ending on September 23, 1955 with a verdict of the jury finding appellant guilty as to Counts IV, V and VI.

Section 1291 of Title 28, U. S. C. vests appellate jurisdiction in the Court of Appeals of all final decisions of the District Courts of the United States.

The indictment (Cl. Tr. pp. 2, et seq.) constitutes the pleading necessary to prove jurisdiction and venue in the District Court hearing of the matter.

However, on August 19, 1955 after the Government rested its case, appellant moved for a judgment of acquittal as to Counts IV, V and VI, and in the event of denial of such motion that the court strike the testimony of witnesses Spicuzza and Hadzima as related to defendant Ballard, and that the testimony of witnesses Helm, Todd and Johnson be stricken as relating to Ballard. (Cl. Tr. p. 149, lines 18 - 24) At the same time appellant moved

for a mistrial. (Cl. Tr. supra)

On the last day that testimony was taken, September 13, 1955, and after both Government and defendants had rested this case, appellant moved for judgment of acquittal, for mistrial and to strike the testimony of certain witnesses.
(Cl. Tr. p. 223, lines 14-25)

All questions raised in this brief to be hereinafter discussed were presented on appellant's arraignment, on all subsequent proceedings in this cause, before the trial court, and on motion for new trial following conviction.

Following the denial of a motion for a new trial appellant gave timely notice of his appeal from the judgment of conviction and order denying motion for new trial to the United States District Court.

QUESTIONS INVOLVED

1. Could appellant Ballard lawfully be indicted for or convicted of violations of U. S. C., Title 18, Section 545, or of conspiracy to violate that section when the objects of importation were psittacine birds, in view of Code of Federal Regulations, Title 42, Section 71. 152 which governs the importation of such birds and violation of which is made a misdemeanor by U. S. C., Title 42, Section 271?

2. Did the trial court abuse its discretion in denying Ballard's motion for bill of particulars when seasonably and timely made?

3. Did the trial court abuse its discretion in denying Ballard's motion for a severance and trial separate from his co-defendants when seasonably and timely made?

4. Can a trial court in instructing a jury properly state to a jury - not in commenting on testimony or weighing or analyzing testimony - but as a matter of cold law that the testimony of an alibi witness should be scrutinized?

5. Can a defendant on trial with two co-defendants be called upon by the court in the presence of the jury to state as to which of two positions he will assume, join with the position of one defendant or with that of the other defendant who has raised a special defense? Is such procedure not in violation of the Fifth Amendment to the United States Constitution?

MANNER IN WHICH QUESTIONS RAISED

These questions were raised by Ballard at the times set forth in the specification of errors by appropriate motions which were denied by the court. The motions made and the time of making them and the record thereof are set forth in the specification of errors.

SPECIFICATION OF ERRORS

Specification of errors numbers 1 to 10 set out herein were raised by Ballard by motions at the times set out in each numbered specification of error and in each instance by the trial court denied. In each of said numbered specification of error there is appropriate reference to the Clerk's Transcript.

1. The trial court erred in denying appellant Ballard's motion to dismiss the indictment. (Cl. Tr. pp. 15; 18, 19, 20; 31-32; 68)

2. The trial court erred in denying appellant Ballard's motion for a severance and separate trial. (Cl. Tr. pp. 42, 43; 67, 68)

3. The trial court erred in denying appellant Ballard's motion for a bill of particulars. (Tr. pp. 21-27; 67-72; p. 77)

4. The trial court erred in denying appellant Ballard's motion for judgment of acquittal at the conclusion of the Government's case. (Cl. Tr. pp. 149-50)

5. The trial court erred in denying appellant Ballard's motion for a mistrial at the conclusion of the Government's case. (Cl. Tr. pp. 149-50)

6. The court erred in denying appellant Ballard's motion for a mistrial after all parties had rested. (Cl. Tr. p. 223)

7. The trial court erred in denying appellant's motion to strike all of the testimony of the witnesses Spicuzza, Hadzima, Helm, Todd and Johnso which related or purported to relate to Counts I, II, III, VII, VIII, IX and X of the indictment, which Counts Ballard was not named as either a defendant or an unindicted co-conspirator.

8. The trial court erred in denying appellant Ballard's motion to strike the testimony of the handwriting expert Fred Miller, the witnesses Giger and Johnson made after all parties had rested. (Cl. Tr. p. 223)

9. The court erred in denying appellant Ballard's motion for a new trial. (Cl. Tr. pp. 293-295, refer to pp. 270 - 283, inclusive)

10. The trial court erred in his comment on the facts and in instructions:

(a) By calling upon Ballard in the presence of the jury to assume a position as to whether in his defense he would side with defendant Duke or defendant Buono. (Tr. p. 3213-14) and in his comment assuming that there was a conspiracy;

(b) By advising the jury that the testimony of the only two witnesses called in behalf of Ballard (alibi witnesses) should "scrutinized".
(Tr. p. 5094, lines 15-24)

11. The court erred in admitting the testimony of witnesses Miller, Springman and Giger as not rebuttal. (circumstances and reference to record set forth in section headed "Evidence Improperly Admitted Against Ballard")

12. The court erred in admitting the testimony of witness Crump as not rebuttal. (Circumstances and reference to record set forth in section headed "Evidence improperly admitted against Ballard")

13. The court erred in admitting the testimony of the witness Johnson as to a transaction not charged in the indictment, as being irrelevant and after bill of particulars denied. (Circumstances and reference to record set forth in Argument that bill of particulars improperly denied.)

14. The court erred in denying Ballard's motion in arrest of judgment. (Cl. Tr. p. 269-93)

STATEMENT OF THE CASE

It is undisputed that the witness, John W. Hadzima, was engaged in the business of smuggling psittacine birds into the United States from 1949 until a short time prior to this trial; from about 1950 to at least March of 1953 the witnesses John W. Hadzima, Nicholas A. Spicuzza and George Todd were engaged in a joint enterprise to smuggle psittacine birds into the United States from a foreign country.

All of the witnesses called by the Government in this case in its case in chief, except the witness, Deputy Sheriff Thomas E. Johnson, who testified on August 17, 1955, were either convicted of smuggling, conspiracy to smuggle (a felony) or admitted such illegal participation. They were:

John W. Hadzima, a twice convicted smuggler
Nicholas A. Spicuzza, a twice convicted smuggler
George Todd, a twice convicted smuggler
Raymond Curtis, convicted smuggler
Robert Helm, convicted smuggler
Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled

We will point in another portion of this brief why the testimony of Deputy Sheriff Thomas E. Johnson was not legally admissible.

That leaves us the factual situation with one witness giving irrelevant testimony and six

witnesses, all of them felons or admitting to felonies, all of them obviously interested in the outcome of this case, the only witnesses against appellant.

The evidence in this case implicating appellant comes largely from the incident known as the Desert Center Hijacking, which it is claimed occurred on May 13, 1953.

The evidence concerning Desert Center "hijacking", which appellant contends is the only evidence in support of Counts IV, V and VI, as far as Ballard is concerned, is that Helm claims he told Hadzima, Pursselley, Duke, Buona and Ballard that Spicuzza and Todd were flying birds into Desert Center and that plans were made to rob and steal these birds from Spicuzza and Todd, or their agents. The date the birds were to be landed was May 13, 1953. Spicuzza, Curtis, Hadzima and Helm fixed the date of the hijacking as May 13, 1953. Mary Asconi said the birds were delivered to her aviary in Burbank, California by Hadzima on the early morning of May 14, 1953.

In view of what is later herein said concerning the proclivity of Spicuzza and Todd as smugglers, Ballard urges that the testimony of Spicuzza, Curtis, Hadzima, Helm and Ascani prove no violation of the charges contained in the indictment with reference to Ballard.

According to their own testimony, Spicuzza and Todd were engaged in the smuggling of psittacine birds. The witness, Raymond A. Curtis, an employee of Jack Young of Cleveland, Ohio, was a

dealer in smuggled birds. Mary Asconi was a dealer in smuggled birds. Robert Helm, according to his own testimony, was in the employ of Spicuzza and Todd in flying in smuggled birds. Hadzima had been a partner of Spicuzza and Todd in smuggling birds. He testified he procured the services of Ballard, through Pursselley in 1953, to steal birds in the United States from Spicuzza and Todd.

Whether appellant Ballard lived or died, or was unheard of, Spicuzza and Todd would have smuggled birds. They had in the past and continued to do so after their conviction in Case No. 22891, Southern Division, San Diego, California. That this is so is proven by the fact that after their release on bail, pending appeal in Case No. 22891, in cooperation with Helm they smuggled psittacine birds in December of 1953 and were thereafter convicted and sentenced to prison.

Facts offered on behalf of appellant, found adversely to appellant by the jury, were in the testimony of Alma Ballard, wife of defendant, and Clayton Beraldo, both residents of Santa Barbara, California, that appellant was in Santa Barbara, California on May 13, 1953 and therefore could not have been at Desert Center, California, over 200 miles distant, on that same night.

ARGUMENT.

I.

APPELLANT BALLARD COULD NOT LAWFULLY BE PUNISHED FOR VIOLATIONS OF UNITED STATES CODE, TITLE 18, SECTION 545, NOR OF CONSPIRACY TO VIOLATE SAID SECTION, ON ALLEGATIONS AND EVIDENCE SHOWING THAT THE OBJECTS THE IMPORTATION OF WHICH WAS INVOLVED WERE PSITTACINE BIRDS.

At all pertinent times certain provisions of the laws of the United States were as follows:

(1) The first paragraph of 18 USC 371 makes it a felony for two or more persons to conspire to commit an offense against the United States. The second paragraph of said section makes the conspiracy a misdemeanor, if the offense which is the object of the conspiracy is only a misdemeanor.

(2) 18 USC 545 is a general statute prohibiting the importation of merchandise contrary to law, and punishable as a felony.

(3) 42 CFR 71.152 is a specific regulation adopted pursuant to 42 USC 264 expressly prohibiting the importation of psitttacine birds into the United States except under specified conditions. 42 USC 271 makes a violation of the specific law a misdemeanor.

(4) 18 USC 42-42 is a specific statute pertaining to animals, birds and fish and makes it a misdemeanor to import or transport any wild animal or bird from a foreign country contrary to any act of Congress or in violation of regulations of the Secretary of the Treasury.

Count IV of the indictment charged Ballard with the crime of conspiracy to commit an offense against the United States. The offense alleged to be the object of the conspiracy was the smuggling and illegal importation and transportation of psittacine birds.

Ballard was sentenced to prison for five (5) years on this count. By reason of the first paragraph of 18 USC 371 it is respectfully contended here that this punishment was excessive and that the offense should have been punished by the lesser penalty, according to the second paragraph of 18 USC 371.

With respect to Counts V and VI Ballard was sentenced to prison for two (2) years on each count to run consecutive. It is appellant Ballard's contention that the allegations of the indictment and the evidence produced by the Government tended to show commission of offenses and conspiracy to commit offenses punishable as misdemeanors under 42 U. S. C. A., Sec. 271 (a) or 18 USC 42 and 43, and that violation of neither could be proven without proving violation of the other, and that, in these circumstances, the prosecution must be for commission of and conspiracy to commit the offense carrying the lesser penalty.

In Steiner vs. United States, 229 F.2d 745 (C. A. 9, this Honorable Court rejected the identical questions under this topic, stating that they were without merit. (Two appellants in the Steiner case filed separate petitions in the United States Supreme Court for a writ of certiorari. Both petitions were denied on May 28, 1956, 76 S. Ct. 845 & 847) However, since the decision by this Honorable Court in the Steiner case, the United States Supreme Court,

decided Berra vs. U. S., ____ U.S. ____, 100 L. Ed. 563, 76 S. Ct. 685, on April 30, 1956. In that case, Mr. Justice Harlan, speaking for a majority, refused to consider the effect of overlapping criminal statutes proscribing identical conduct but imposing different punishments. The only issue before the Court, as viewed by the majority, was whether the trial court erred in refusing to instruct the jury that they could find petitioner guilty of the offense which provided the lesser penalty. In holding no error, the Court stated at 688:

> "Whatever other questions might have been raised as to the validity of petitioner's conviction and sentence, because of the assumed overlapping of (sections) 145(b) and 3616(a), were questions of law for the court. No such questions are presented here."

In a dissenting opinion, Mr. Justice Black, with whom Mr. Justice Douglas joined, took the position that the case should be reversed or at least remanded for re-sentencing under the misdemeanor statute, stating at 690 and 691:

> "The Government argues . . . 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney . . . I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual . . ."

> "A basic principle of our criminal law is that the Government only prosecutes people

for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.

* * *

"Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command."

It is respectfully submitted that this Honorable Court should reconsider its decision in the Steiner case, supra, in the light of the Supreme Court decision in the Berra case, and determine whether or not the present case should not be remanded at least for correction of sentence.

Although the Supreme Court denied the petitions for writ of certiorari filed by two of the appellants in the Steiner case after the Berra case, it is submitted that such denial is not a determination by the Supreme Court that this contention is without merit.

II.

THE JUDGMENT IN COUNTS V & VI IMPOSING CONSECUTIVE PUNISHMENT SHOULD BE REVERSED BECAUSE INSUFFICIENT FACTS ARE ALLEGED IN THOSE COUNTS TO CONSTITUTE ANY OFFENSE PUNISHABLE UNDER THE LAWS OF THE UNITED STATES.

Count V of the indictment charged that on May 13, 1953 Ballard, together with Duke and Buono, smuggled thirty crates of psittacine birds which should have been invoiced, and that said birds were imported in violation of United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count VI of the indictment charged that on May 13, 1953 Ballard, together with Duke and Buono, received, concealed and facilitated the transportation and concealment of thirty crates of psittacine birds. (Same birds mentioned in Count V) with knowledge they had been imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Appellant made a timely motion to dismiss the indictment on the grounds set forth in this question. Appellant's motion was denied. Appellant made the same motion in arrest of judgment on September 30, 1955, and the motion was again denied. Appellant also made a timely motion for a bill of particulars which was denied. All the evidence produced by the Government concerned the importation and transportation of psittacine birds. The court instructed the jury that the "merchandise" referred to in the indictment (i. e., psittacine birds) should have been invoiced. (Tr. p. 5084, lines 9 - 12)

The court further instructed the jury that under the law all merchandise imported from any contiguou country must be presented to a customs officer for inspection at the first port of entry at which merchan dise arrives. Further, an "entry" must be made for all imported merchandise within 48 hours after the arrival of such merchandise in the country. For this purpose the person making such entry must produce an invoice for the merchandise. Every person makin an entry must file with the entry a declaration, under oath, which declaration states that the information contained in the entry, the invoice, and any other document filed with the entry are true. (Tr. 5080-81)

Appellant submits that the indictment on its face is fatally defective because:

1. Psittacine birds are not "merchandise whic should have been invoiced". Under the Code of Fede Regulations psittacine birds could not have been imported into the United States except in the manner an under the exceptions allowed in Section 71.152 of Titl 42 of the Code of Federal Regulations. Therefore, t require entry and invoicing of psittacine birds 48 hou after importation would in effect compel a person to accuse himself of a crime, to wit: a violation of the Code of Federal Regulations with reference to the im portation of psittacine birds.

2. The allegation that psittacine birds were brought in contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484, is not sufficient because no fact or facts are alleged which would show unlawful importation, or a violation of these sections. Furthermore, such allegations are vague and ambiguous because Chapter 4 of Title 19 of the United States Code contains more than two-hundred sections with numerous prohibitions

the violation of each of which is a crime calling for a certain specified penalty, The penalty in some instances is a nominal fine and in others imprisonment for as long as five years.

The pertinent part of Section 545 of Title 18, United States Code reads:

> "545. Smuggling goods into the United States.-- Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or
>
> "Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --"

The first and second paragraphs of this section charge separate and distinct offenses.

In Babb vs. United States, 218 F. 2d 538, the court stated:

> "The statute under which this prosecution is lodged defines two separate types of offenses: (A) smuggling or clandestinely introducing any merchandise which should have been invoiced, or use of various or forged documents, etc.; and (B) knowingly importing or bringing in any merchandise contrary to law, or receiving,

concealing, etc., such merchandise knowing it to have been brought in contrary to law. These are distinct offenses, as shown by their legislative history."

It is submitted that the first paragraph would apply to merchandise which could be lawfully imported, and the second paragraph would apply to the importation of merchandise in violation of any other statute or regulation. The first paragraph is directed specifically to the protection of the revenue of the United States, since an essential ingredient of the offense is an intent to defraud the United States of revenue.

U. S. vs. Kushner, 135 F. 2d 668

The purpose of requiring an invoice to be presented for imported goods is to enable the collector of customs to properly determine the duties to be imposed. Section 1461 of Title 19, United States Code prescribes ten items of details required to be set forth in an invoice. It is apparent that those items are for the purpose of assessing a duty on the imported articles.

Section 1484(a) of Title 19, United States Code provides that:

". . . the consignee of imported merchandise shall make entry therefor. . . . Such entry shall be made at the custom house within 48 hours . . . after entry of the importing vessel or report of the vehicle. . . ."

Section 1484(b) provides:

"No merchandise shall be permitted to entry without the production of a certified invoice therefor . . ."

Although Count V of the indictment in this case purports to charge a violation of both the first and second paragraphs of Section 545 of Title 18, Count VI only purports to charge a violation of the second paragraph. The attempt to charge in Count V a violation of the first paragraph is abortive.

In Babb vs. United States, supra, the indictment charged that the defendants had knowingly, wilfully and fraudulently concealed, transported and facilitat the transportation of certain merchandise, to wit; approximately eight head of cattle, after importatior each knowing the same to have been imported and brought into the United States contrary to law. The court stated:

> "We held that the indictment should have alleged some fact or facts showing that the cattle in question were imported or brought in contrary to some law; and that it is not enough to say that they were imported or brought in 'contrary to law'."

The indictment in this case does not meet the objection stated in the Babb decision. It is no more effective to charge that merchandise was brought into the United States contrary to a section of the United States Code than it is to state that the merchandise was brought in "contrary to law".

In Sutton vs. United States, 157 F. 2d 661, the court stated:

> ". . . Turning to the information, we note that at a certain time and place the appellant had in his possession and under his control ten thousand pounds of sugar, the same being a rationed commodity. The mere possession or control of

rationed sugar is not an offense, and yet the information charges no other fact unless the following words constitute an allegation of fact:

> 'In violation of Second Revised Ration Order Number 3 and General Ration Order Number 8, as amended.'

"The phrase just quoted is not an allegation of fact but a legal conclusion of the pleader; it constitutes no part of the description of the offense. In The Hoppet vs. United States, 7 Crunch 389, 393, 3 L. Ed. 380, Marshall, C. J., said:

> 'It is not controverted that in all proceedings in courts of common law, whether against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of provisions of a particular statute, will not justify condemnation, unless, independent of this allegation, a case be stated which show that the law has been violated. The reference to the statute may direct the attention of the Court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. . .' "

It is respectfully submitted that both counts V and VI of the indictment do not allege facts sufficient to constitute a cause of action because first, as to Count V the importation of psittacine birds if punishable at all under 18 U. S. C. 545, such conduct is an offense under the second paragraph of said section rather than the 1st; and second, the allegation in both Counts V and VI that psittacine birds were imported contrary

to 19 U. S. C., Chapter 4, particularly sections 1461 and 1484, does not state facts sufficient to constitute a cause of action.

In Steiner vs. United States, 229 F. 2d 745, this Honorable Court approved the decision in the Babb case, supra, and reversed the judgment of conviction on the substantive counts, because the allegation "contrary to law" was insufficient and could not be cured by a request for bill of particulars.

It is respectfully submitted that the allegation stating that merchandise was imported contrary to certain provisions of the United States Code is no different than the allegation "contrary to law".

III.

THE MOTION OF APPELLANT FOR A BILL OF PARTICULARS AS TO COUNTS IV, V & VI SHOULD HAVE BEEN GRANTED.

The motion of Ballard for a bill of particulars as to Counts IV, V and VI should have been granted. The case of United States vs. Lieberman, 15 Fed. Rules Decision 278, in the opinion of Ballard is controlling as to Counts V and VI of the indictment.

United States vs. Lieberman, supra, is also authority for the proposition that the defendant is entitled to a bill of particulars as to Count IV of the indictment.

In United States vs. Lieberman, supra, the case of United States vs. Eastman is cited, and the opinion of Judge Learned Hand is quoted there. The case of United States vs. Eastman was conspiracy

case and Judge Hand ruled that although the allegations of the indictment as they stand would support a prosecution, nevertheless the defendants were entitled to a bill of particulars.

The fact that the defendants were charged with conspiracy does not take away their right to a bill of particulars if the indictment fails to advise the defendant with sufficient particularity to enable him to prepare his defense, and to safeguard him from further prosecution for the same act.

The Government cannot avoid the responsibility of furnishing a bill of particulars by claiming that they are not required to disclose their case or by claiming that the defendant being charged must necessarily know of what he is accused.

> "Before a person can become a 'conspirator' or an 'abettor', knowledge of wrongdoing of other is not sufficient, but he must in some sense promote their venture himself, make it his own, or have a stake in its outcome."
>
> United States vs. Falcone, 109 F. 2d 109 affirmed 61 S. Ct. 204, 311 U.S. 205, 85 L. Ed. 128.

In further support of the claimed error that a bill of particulars should have been granted, and in support of the contention that evidence was introduced beyond the scope of the charge contained in the indictment, Ballard respectfully submits:

Assuming, but not conceding, the indictment sets forth the facts constituting the essential elements of the offense charged so that it cannot be pronounce bad upon the motion to quash or dismiss, Counts IV,

V and VI are couched in such language that the defendant is liable to be surprised by the production of evidence for which he is unprepared and is therefore entitled to a bill of particulars:

Rinker vs. United States, 151 F. 755 at 759:

"A bill of particulars should be furnished if the indictment fails to advise the defendant with sufficient particularity of matters necessary to enable him to prepare his defense and to safeguard him from further prosecution for the same act."

Lett vs. U. S., 15 Fed. 2d, 686 at 688.

Indictment charging defendant with knowingly and wilfully smuggling and clandestinely introducing diamonds into the United States was not sufficient to apprise defendant of precise charge against him and government would be required to provide by bill of particulars information as to whether defendant was charged with having introduced the diamonds personally or having aided, abetted, counselled, commanded, induced, procured or caused such introduction and if one of the latter acts, which one, and the means by which it was performed.

U. S. vs. Lieberman, (D. C. N. Y. 1953)
15 Fed Rules Decisions 278

In Fishwick vs. United States, 329 U. S. 211, 67 S. Ct. 224, the indictment charged a conspiracy, between September 1, 1939 and September 13, 1944, (date the indictment was returned), to defraud the United States, etc. The last overt act alleged to have been committed was December 23, 1940.

Held: The overt acts averred and proved may

thus mark, the duration as well as the scope of the conspiracy. CONVICTION REVERSED because tria court allowed statements of defendants made after date of last averred act to be introduced against others. The conspiracy terminated before statements made, thus not made in furtherance of conspiracy.

The termination date alleged in conspiracy by implication held not material.

In Fishwick vs. United States, supra, the Supren Court of the United States indicates that it is against the policy of the Government to sustain prosecutions for conspiracy which under the prosecution's theory continue after the last overt act is alleged.

In Glasser vs. United States, 315 U.S. 60, 62 S. Ct. 457, a conspiracy case, the Supreme Court held the indictment sufficient as against demurrer. That the particularity of time, place, circumstances causes, etc. in stating the manner and means of effecting the objects of a conspiracy not essential to the indictment - "SUCH SPECIFICITY OF DETAIL FALLS RATHER WITHIN THE SCOPE OF A BILL OF PARTICULARS." (Emphasis added)

On Tuesday, August 2, 1955, Ballard received a copy of the trial memorandum furnished by the U. S. Attorney. On Wednesday, August 3rd the entire cou day was consumed in the selection of a jury. On Thu day, August 4th some time was consumed in settling the status of Duke as a defendant and as to his right to participate as an attorney. Thereafter, and befor the Government's opening statement was made to the jury, defendant Ballard objected to the introduction of any evidence as to alleged transactions which occurred before the date of the conspiracy as charged

in Count IV of the indictment, and as to any transactions that occurred after the last dated overt act charged in IV of the indictment; and at that time Ballard pointed out to the Hon. Ernest A. Tolin in response to the court's query that these matters had been raised before Judge Weinberger in June of 1955 at the time demand was made for the bill of particulars.

The clerk's transcript, pages 70-72, shows that Ballard filed supplemental authorities in support of his motion for a bill of particulars. At that time Ballard did not know and could not foresee that the Government would offer evidence as to transactions occurring prior to the date alleged as to consummation of the conspiracy.

However, in view of the charge that the conspira in Count IV extended to December, 1954, and the las overt act charged in Count IV of the indictment was June, 1953, Ballard was pressing hard to find out a least the outline of what the Government planned to support the alleged conspiracy between June, 1953 and December, 1954.

On pages 70 and 71 of the clerk's transcript, Ballard makes the point that whether a motion for a bill of particulars was granted or not, that he anticipated that the trial court would not permit evidenc pertaining to the alleged conspiracy as to matters o curring after the last overt act. Again it is pointed out that as shown by the record, that this factual situation was called to the attention of Judge Tolin prior to the Government making its opening statement and as expeditiously as possible after receivin the Government's trial memorandum.

(Tr. pp. 48-52; App. 134-38)

Ballard contends that it was improper under the circumstances to receive the evidence of Deputy Sheriff Johnson and of Hadzima as to transactions occurring in February and March, 1953, and the testimony of Hadzima as to what occurred on certain dates following July, 1953.

IV.

APPELLANT MADE A TIMELY MOTION FOR A SEVERANCE FROM HIS CO-DEFENDANTS WHICH WAS DENIED, AND APPELLANT WAS SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON THEREOF.

The indictment contained ten counts. Appellant was charged in only three of said counts. Furthermore, these counts pertained to a single transaction concerning a conspiracy to illegally import psittacine birds, and two substantive counts concerning the illegal importation and transportation of the same birds. The conspiracy and the two substantive counts of which Appellant was charged involved a specific transaction alleged to have occurred on May 13, 1953.

The indictment alleged two other separate conspiracies and five other substantive counts, none of which contained any allegations against appellant.

Appellant made a timely motion that he be tried separately from his co-defendants, or that the trial be severed so as to try the three counts in which Appellant was named separately from the remaining seven counts. Both motions were denied.

At the conclusion of the Government's case in chief, Ballard made a motion for a mistrial on the grounds that he had been substantially prejudiced on account of evidence received in support of the charges in Counts I to III, and Counts VII to X of the indictment, which did not pertain to Ballard. Likewise, Ballard moved to strike from the evidence all testimony of the witnesses Spicuzza, Todd, Helm and Hadzima wherein said testimony related to Counts I to III and Counts VII to X of the indictment on the grounds that said testimony, insofar as Ballard was concerned, was not binding on him and had no reference to the charges contained in Counts IV, V and VI where he was named as a defendant.
(Tr. pp. 1891 - 97; App. 320-27)
Both motions were denied. (Cl. Tr. p. 150)

The evidence introduced by the Government in support of the charges contained in the seven counts of the Indictment in which Appellant was not named was highly prejudicial and had the effect of subjecting Appellant to those evils inherent in a "mass trial". It is respectfully submitted that had Appellant been tried separately from his co-defendants that the verdict of the jury would have been otherwise, and that as a matter of law the motion for severance or motions for mistrial should have been granted.

United States vs. Perlstien, 120 F. 2d 276

Castellani vs. United States, 64 F. 2d 636

United States vs. Merchant, 25 U. S. 80

United States vs. Ball, 163 U. S. 672

In this case not only was Ballard deprived of a fair and impartial evaluation by the jury of evidence as to his guilt or innocence, separate and apart from the evidence admitted against his co-defendants, but quite to the contrary, Ballard, who did not take the witness stand, was called upon by the trial judge in the presence of the jury to choose between one or two conflicting positions being taken by his two co-defendants.

As an illustration, appellant refers to Reporter's Transcript, pages 3213 and 3214 where the following colloquy between the court and counsel for Ballard took place in the presence of the jury, after an extended discussion, which to Ballard seemed like an argument, to the prejudice of appellant Ballard.

"(THE COURT): * * * Now, Mr. Whelan, do you want to state a position for Mr. Ballard? Do you join with Mr. Duke or are you at odds with him, as Mr. Langford is?

"MR. WHELAN: Your Honor pleases, I am not at odds with anyone. I think perhaps, as the evidence develops, there be some explanation as to why Ballard was included in this case.

"Naturally, I want to take advantage of any situation that does develop. I am not claiming anything particularly at this time, unless it is supported by the evidence.

"THE COURT: Your defense, insofar as I have observed here, is a defense of alibi. 'I wasn't present at the time.'

"MR. WHELAN: That is right, your Honor.

"THE COURT: And I suppose also that includes the defense, so far as the conspiracy is concerned, because conspiracy was over a considerable period of time when Ballard was present, at least, within the area in which the conspiracy supposedly operated.

"You haven't disputed that; that the defense is also, "I did not do it. "
(Tr. pp. 3213, line 14 - 3214, line 8)

It is significant to note that the statement of the court to counsel assumes a conspiracy "because conspiracy was over a considerable period of time when Ballard was present . . . "

For the court to call upon Ballard to assume a position or a defense would be a denial of his constitutional rights in violation of the Fifth Amendment to the United States Constitution.

It is significant to note that Duke and Ballard were convicted as to Counts IV, V and VI, and Buono acquitted as to those counts. As to those counts, the evidence against Buono was equally as strong as that against Duke, the Government testimony showing that meetings allegedly took place in Buono's office with Buono present and participating.

This result certainly shows prejudice to Ballard by being required to go to trial with his co-defendants. Perhaps had he disavowed Duke's so-called special defense * (see footnote at end of this topic) and elected to adopt the position taken by Buono, he too might have been acquitted. Ballard should not have been called upon to join with either of his co-

defendants, nor should he have been called upon to take a position either contrary to or in conjunction with either of them. Ballard suffered from the prejudicial joinder as it was, and it is respectfully submitted that it was the duty of the trial judge to make every effort to eliminate any additional prejudice rather than force him, in the presence of the jury, to join with one of them.

A further illustration of the manner in which Ballard was prejudiced by denial of his motion for severance is as follows:

Before Ballard was ever heard of Spicuzza, Todd and Hadzima were smuggling psittacine birds. The first three counts of the indictment referred to a claimed situation testified to by Spicuzza, Todd, Hadzima and Helm to the effect that they had entered into an agreement between themselves and with Duke to smuggle birds. It is conceded that Ballard was no part of this alleged conspiracy or smuggling. Thereafter, Hadzima withdrew from that alleged agreement. Then came the Desert Center situation wherein it is claimed Ballard participated, referring to Counts IV, V and VI. Then came the conspiracy Count VII and the substantive Counts VIII, IX and X wherein it was claimed Buono advanced money to Helm to buy a plane and that Spicuzza and Todd were to smuggle birds with Helm flying them into this country from Mexico. With evidence from Spicuzza, Todd and Helm on these charges, it also

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* Note: See Opening Brief of Appellant Clifford L. Duke, Jr. for review of proceedings and incidents occurring during the trial pertaining to this so-called special defense.

follows as a certainty that if Duke was guilty on all counts and Buono guilty on Counts VII, VIII, IX and X, that the jury would find Ballard guilty by association with his co-defendants charged in Counts IV, V and VI.

The testimony of witness Hadzima concerning a new conspiracy in July of 1953, between himself, Ballard and Duke, was improperly admitted.

The danger of mass trial has been announced and declared:

In Canella v. United States, 157 F. 2d 470, at 476, 477 we find the following:

> "The theory of the trial court here and of the trial court in the Kotteakos case, was that all the evidence relating to all the separate spokes in the wheel was admissible against McCormac and Wyckoff and was relevant to the charge of a single conspiracy because of the general rule that when one joins an existing conspiracy, he 'takes it over as it is' and becomes liable for all that has gone before or may happen later. However, 'to bring this rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations * * * become competent only when they are uttered in order to accomplish the common purpose.'

"The view taken at the trial here, as in the trial of Kotteakos v. United States, 'confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.' 66 S. Ct. 1250."

And in Canella v. U. S., supra, at Page 478:

"The instant case, with five conspiracies involving at least 12 persons, 'lies somewhere between' Berger v. United States and Kotteakos v. United States, and we are unable to say that 'prejudice to the substantial rights' of Wyckoff, and McCormac has not taken place. For even though here, as the Second Circuit Court of Appeals found in the Kotteakos case, the evidence concerning Wyckoff and McCormac disclosed that each shared in the fraudulent phase of the conspiracy in which they participated; and even though their convictions, had they been obtained in separate trials or on an indictment with separate counts, could not have been disturbed, it appears 'highly probable that the error (of mass trial) had substantial and injurious effects or influence in determining the jury's verdict.' 66 S. Ct. 1253."

V.

THE COURT ERRED IN ONE MATERIAL INSTRUCTION PREJUDICIAL TO BALLARD.

"The defendant Ballard has offered some evidence of what we know in law as an alibi. An alibi is a circumstance of a person not being present at the time that an offense was committed. You should scrutinize the testimony of the persons

who told you that Mr. Ballard was in Santa Barbara at the time that certain prosecution witnesses said he was in some other place. Analyze it. And, of course, the burden is always upon the Government to show that the defendant is present at the place where he was supposedly committing the offense."
(Tr. p. 5094, lines 15-24)(Emphasis added)

On pages 5113 to 5114, Volume 25 of the Reporter's Transcript the court, after completing his instructions, gave an instruction at the request of Appellant which may have, in a sense, somewhat toned down the objection to the instruction complained of -- but can it be said when the jurors heard the instruction of the court stating that the jurors should scrutinize the testimony, they did not reach the conclusion that these alibi witnesses were unreliable?

EVIDENCE IMPROPERLY ADMITTED AGAINST BALLARD

On or about February 10, 1953 Appellant was arrested by Deputy Sheriff Thomas E. Johnson, of San Diego County, first for speeding and suspicion, and then turned over to United States Customs officers because he had crates of parakeets in his truck. He was later released and not prosecuted and his parakeets returned after a conference with Customs Inspector Rae Vaeder and Assistant United States Attorney Morris Sankary.

Appellant objected to the introduction of this evidence because not charged in the indictment and because of failure of Government to furnish a bill of particulars. Also, because no showing of any unlawful conduct in the situation on part of Appellant.

Hearsay evidence was introduced over objection of Appellant, because it was not charged in the indictment and because of failure of the Government to furnish a bill of particulars, to show that one George Monolias, who it is said, was smuggling psittacine birds for Hadzima, Spicuzza and Todd, was hijacked and beaten up, and the birds taken. The circumstances would leave an inference that Ballard was one of the robbers. Monolias was not called as a witness. This incident was supposed to have occurred early in March, 1953 in Riverside County, California.

Evidence was introduced by John W. Hadzima to the effect that in July, 1953, after a dissolution of the partnership he claimed with Duke, Buono,

Helm, Pursselley and Ballard, because he claimed Pursselley was untrustworthy, that he told Duke that there was a new partnership and that he and Ballard were going alone to smuggle birds; that if Duke would care to join them he could have ten per cent of the profits and that Hadzima and Ballard would have 45% each. The objection was that this was outside of the scope of the charge in the indictment, and because of failure of the Government to furnish a bill of particulars and because of evidence of a separate and new conspiracy.

Evidence on rebuttal which was improperly admitted over the objection of Appellant came from Fred M. Miller. (Tr. pp. 3666, et seq.) When an objection was made that the evidence was not rebuttal and should have been offered as part of the Government's case in chief, the court questioned the United States Attorney, who replied:

> "MR. STEWARD: We couldn't anticipate an alibi witness, an alibi defense."
> (Tr. p. 3671, lines 11-12)

In appellant Ballard's opening statement made August 4, 1955, two weeks and one day prior to the Government resting its case, appellant stated that he expected to prove that on May 13, 1953, the key date when Spicuzza, Curtis, Hadzima and Helm said the robbery at Desert Center occurred, that he was in Santa Barbara hours away from Desert Center in Riverside County.
(Tr. pp. 100-101; App. 161-62)

The testimony of the witness Charles J. Springman (Tr. pp. 3708-16) from the Motor Vehicle

Department of California, and the testimony of Marvin W. Crump (Tr. pp. 3717-23) was admitted in evidence over the objection of Ballard on the grounds of being incompetent, irrelevant and immaterial, and not rebuttal.

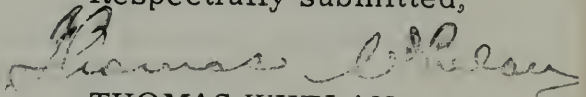
The testimony of the witness Giger (Tr. pp. 3995, et seq.) concerning a registration card of a motel in Indio, California, on May 12, 1955 was objected to as incompetent, irrelevant and immaterial, and not rebuttal.

The testimony of Miller, Springman, Crump and Giger would have been admissible in the Government's case in chief, but actually rebutted no evidence offered in Ballard's defense.

CONCLUSION

For the reasons herein stated, it is respectfully urged that the judgment of conviction and order denying new trial be reversed.

Respectfully submitted,



THOMAS WHELAN
Attorney for Appellant Ballard

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

THOMAS WHELAN, being first duly sworn, deposes and says:

That he is a citizen of the United States, an attorney at law licensed to practice in the County of San Diego, State of California with offices at 413 Orpheum Theatre Building, San Diego, California; that he is over the age of eighteen years and is not a party to the above entitled action;

That on August 20, 1956, he deposited three copies of Appellant's Opening Brief on behalf of Louis Glenn Ballard, Docket Number 15146, in the United States mail at San Diego California, in a parcel bearing the requisite postage, addressed to MR. HARRY STEWARD, Assistant United States Attorney, 325 West "F" Street, San Diego, California, his last known address, at which place there is regular communication by United States Mail.

Thomas A. Whelan

THOMAS WHELAN

Subscribed and sworn to before me
this 20 day of August, 1956.

Mary Hanby Duke

Mary Hanby Duke
Notary Public in and for the
said County and State.
My commission expires June 11, 1957

(Seal)